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IN THE

Supreme Court of The United States

October Term, 1966

No. 264

CONTRACT CARRIERS, INC. and JOSEPH L. McCORKHILL,

Petitioners,

v.

JOHN ANTHONY MARKIEWICZ, a minor, by his Father and next friend, EDWARD MARKIEWICZ, and EDWARD MARKIEWICZ and JENNIE MARKIEWICZ, and THE GREYHOUND CORPORATION and ROBERT L. SCHLAGENHAUF,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS', THE GREYHOUND CORPORATION AND ROBERT L. SCHLAGENHAUF, BRIEF IN OPPOSITION

The Respondents pray that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review a Judgment of that Court entered in the entitled case on March 24, 1966, be denied.

QUESTIONS PRESENTED

1. Should this Court grant further appellate review of evidence and inferences drawn therefrom, by means of certiorari, in a negligence case?

2. Should this Court grant certiorari where the Circuit Court of Appeals afforded a proper and complete appellate review?

3. Should this Court grant certiorari to review the determination of an Appellate Court that the findings of fact of the trial court have sufficient support in the record?

4. Should this Court grant certiorari to review the determination of an Appellate Court that the trial court's conclusions of law are correct and that the inferences drawn from disputed facts by the trial court are permissible?

5. Should this Court grant certiorari where Petitioners have not demonstrated an issue of national importance nor demonstrated a real conflict of opinion or authority exists between circuit courts or the panels of the Seventh Circuit?

STATUTES AND FEDERAL RULES INVOLVED

Section 47-2006, Burns' Indiana Statutes Annotated (1952 Repl. Supp.)

> "No person shall drive a motor vehicle at such a low speed as to impede the normal and reasonable movement of traffic, except when reduced speed is necessary for safe operation or in compliance with the law."

Rule 52(a) Federal Rules of Civil Procedure:

> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate

judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a matter, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

STATEMENT OF FACTS

John Anthony Markiewicz and Jennie Markiewicz, plaintiffs, were paying passengers aboard a Greyhound Bus, operated by Robert L. Schlagenhauf in the eastbound lanes of U. S. Highway 40, which is a four-lane divided highway, at about 1:05 A. M. on July 13, 1962, between Stilesville and Belleville, Indiana, when the bus collided with the left rear of a Trailmobile trailer pulled by a 1960 G.M.C. tractor owned by Contract Carriers, Inc. and operated for them by Joseph L. McCorkhill.

The G.M.C. tractor had experienced loss of ability to produce normal forward speed for over 100 miles prior to reaching the point of collision. The driver of the tractor, McCorkhill, made several stops to investigate the cause of the power failure and had contacted the Contract Carriers dispatcher at Anderson, Indiana, advising the dispatcher that the maximum forward speed of his vehicle was about 30 miles per hour. McCorkhill was authorized to operate the unit to its destination.

The slow down of the McCorkhill vehicle was due to a progressive accelerator breakdown which progressively diminished the amount of acceleration.

Prior to this collision, Contract Carriers, Inc. had experienced this type of defect with all the tractors of this type and to enable emergency repair had placed a spare part in the glove compartment of each vehicle.

McCorkhill had experienced similar difficulty on a previous occasion and had reason to believe a spare part with which to correct the defect was available in the glove compartment of the tractor which he was operating.

McCorkhill, without making any repair, continued east on U.S. Highway 40 at a speed of 20 to 30 miles per hour.

Schlagenhauf, the operator of the Greyhound Bus, overtook an eastbound tractor-trailer operated by one Louie L. Stone in the southernmost lane of highway 40. After passing the Stone vehicle, Schlagenhauf operated his right turn signals and started to turn the bus from the northernmost lane in front of the Stone vehicle and reviewed the passed vehicle in his rear view mirror. He observed red lights in front of him and started to return the bus to the northernmost lane to pass the vehicle, but about 24 inches of the right front of the bus collided with the left rear of the trailer.

Schlagenhauf did not correctly associate the proximity of the red lights he observed in front of him after passing the Stone vehicle and did not correctly compare his speed with the speed of said lights during and immediately after passing the Stone vehicle. He did not recognize a collision was imminent until it was too late to avoid it.

After three days of trial to a jury a stipulation as to damages was reached. The Petitioners, Contract Carriers,

Inc. and Joseph L. McCorkhill, with all parties to the action concurred in waiving the jury and elected to proceed to try the issues of liability to the Court. The District Court found that Petitioners failed to perform their statutory duty to the plaintiffs in that Petitioners' vehicle was operated at such a low speed as to impede the normal and reasonable movement of vehicular traffic, and that the conduct of McCorkhill was contrary to the conduct a prudent operator of a tractor-trailer exercising ordinary care would have used under the same circumstances. The Court further found that such conduct constituted causal negligence along with the negligence of the driver of the bus in bringing harm to the plaintiffs.

The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the District Court by a two to one decision and sitting En Banc denied a Petition for Rehearing En Banc by a six to one decision.

REASONS TO DENY THE WRIT

Respondents urge that this Writ be denied for the following reasons:

I. This Court should not grant certiorari to provide further appellate review of evidence and the inferences drawn therefrom in a negligence case.

II. The Petitioners received a proper and complete appellate review consistent with the accepted and usual course of judicial procedure.

III. This Court should deny certiorari where Petitioners have not demonstrated an issue of importance nor demonstrated that a real conflict of opinion or authority exists between the Circuit Courts or the panels of the Seventh Circuit.

IV. Federal District Courts must apply state statutes as construed by the state courts. The Court of Appeals' affirmation of the Judgment rendered by the Federal District Court for the Southern District of Indiana is in accord with Indiana law and consistent with decisions in other states.

I.

THIS COURT SHOULD NOT GRANT CERTIORARI TO PROVIDE FURTHER APPELLATE REVIEW OF EVIDENCE AND THE INFERENCES DRAWN THEREFROM IN A NEGLIGENCE CASE.

This case is strictly a negligence case. The importance of the case is confined to the litigants and to the particular fact situation which gave rise to a collision between a Greyhound Bus and a tractor-trailer. Negligence cases, which do not also present a question of constitutional law or other questions of major importance, as set out in Rule 19 of the Rules of the Supreme Court, should not be reviewed on certiorari for the reason that the interpretation of facts as opposed to rules of law become the elements of contention, and this Court would be required to sit not as an appellate tribunal but as another trial court.

This Court has stated it would not grant certiorari for the purpose of reviewing evidence and discussing specific facts. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U. S. 175 (1938); *United States v. Johnston*, 268 U. S. 220 (1925).

The Petitioners' vehicle for obtaining further review in the Supreme Court is a claim that the United States Court of Appeals for the Seventh Circuit erred in the review granted Petitioners before the Circuit Court by failing to

find that the judgment of the United States District Court for the Southern District of Indiana was clearly erroneous and under Federal Rule 52(a) should be set aside.

The criteria for application of Rule 52(a) was summarized in *McAllister v. United States,* 348 U. S. 19 (1954). Obviously the Appellate Court, after a review of the evidence, was not left with a definite and firm conviction that a mistake had been made, as Petitioners believe they should have.

This cause appears to be precisely one of a class of cases which Justice Frankfurter in a separate opinion in *McAllister v. United States, supra,* urged this Court to reject. The Justice commented:

> "If there is any class of cases which plainly falls outside the professed considerations by which this Court exercises its discretionary jurisdiction, it is cases involving only interpretation of facts bearing on the issue of causation or negligence. The standards of judgment in this type of litigation are well settled. The significance of facts become the bone of contention, and the facts stir differences that derive from the very elusiveness of the meaning of the myriad unique sets of circumstances in negligence cases. One's deep sympathy is, of course, aroused by a victim of the hazards of negligence litigation in the situations like the one before us."
>
> *McAllister v. United States,* 348 U. S. 19 at 23. (Separate Opinion by J. Frankfurter.)

McAllister v. United States is significant in that the Supreme Court championed the findings of the District Court in a negligence determination and indicated that in such negligence determinations an Appellate Court should not reverse "unless clearly erroneous."

The Court of Appeals for the Seventh Circuit, having thoroughly reviewed the evidence in the present case, held that the finding of the District Court had "sufficient support in the record." (Petitioners' Appendix A, page 9a). Under the clearly erroneous precept this was the only determination the Court of Appeals needed to perform.

The Court of Appeals was cognizant of the Court's position on review and performed the Court's obligation in this case consistent with other panels of the Seventh Circuit. *Smoczynski v. The United States,* 352 F. 2d 44 (7th Cir. 1965); *Koehler v. Ellison,* 226 F. 2d 682 (7th Cir. 1955).

The Petitioners request the Supreme Court to review the concurrent findings of fact made by the District Court and the United States Court of Appeals for the Seventh Circuit. The Supreme Court has indicated the Court's reluctance for such an undertaking "in the absence of very obvious and exceptional showing of error." *Graver Tank and Mfg. Co. v. Linde Air Products Co.,* 336 U. S. 271, 275 (1949).

The Petitioners assert but fail to make a stringent showing of error. Petitioners further have failed to show what constitutional or other important public questions are based upon the factual determination which would warrant this Court ignoring the "two court" rule that concurrent findings shall not be disturbed.

II.

THE PETITIONERS RECEIVED A PROPER AND COMPLETE APPELLATE REVIEW CONSISTENT WITH THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURE.

The Petitioners allege that this Writ should be granted

based upon the contention the decision of the United States Court of Appeals for the Seventh Circuit constituted a departure from accepted and usual course of judicial procedure. In support thereof, the Petitioners have cited several cases for the general proposition that Appellate Courts may review the findings of fact to determine whether they are supported by sufficient evidence. Petitioners cite:

Helvering v. Tex. Penn. Oil Co., 300 U. S. 481 (1936);

Sanders v. Leach, 158 F. 2d 486 (5th Cir. 1946);

Western Cottonoil Co. v. Hodges, 218 F. 2d 158 (5th Cir. 1954).

The Respondents take no issue with the proposition that the Appellate Courts may review findings of fact to determine whether they are supported by sufficient evidence. However, the Respondents do urge that careful attention be given to the opinion written by the United States Court of Appeals for the Seventh Circuit and found at 358 F. 2d 26 and at page 2(a) in Appendix A to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. With reference to the opinion of the Circuit Court, it is apparent that the Court accorded the record a careful and critical analysis.

Specifically, attention is called to the following portions of the opinion which manifest the alertness of the Court to the Court's position on review. For instance:

> "The issue before the Court is whether the *record* supports a finding that the speed at which the Contract Carriers, Inc. vehicle was being operated constituted causal negligence as to the plaintiffs in that it misled and deceived the driver of the bus and impeded the flow of traffic upon the highway. *This finding will not be disturbed on appeal if it may be sustained upon*

a rational view of all of the evidence including all reasonable inferences of which the testimony is susceptible. Smoczynski v. United States, 352 F. 2d 44 (7th Cir. 1965.)" (Emphasis ours)

In regard to the Appellate Court's consideration of the operation of the Contract Carriers vehicle misleading the driver of the Greyhound Bus, the Court stated:

"*Consideration of the record* discloses the operation of the Contract Carriers, Inc. vehicle in the manner and under the circumstances shown here may be found to have contributed to Schlagenhauf's error in judgment as to the relative position and speed of the vehicle . . . ." (Petitioners' Appendix A, page 7a) (Emphasis ours.)

The Petitioners attack the trial court's Finding of Fact No. 11 as having no evidentiary basis. The Appellate Court, reviewing the entire record, not pieces or segments, found to the contrary:

"Significant factors to be considered in the instant case are the time and opportunity of Schlagenhauf for observing and evaluating the relative position and speed of the Contract Carriers, Inc. vehicle. *The evidence* shows that Schlagenhauf approached from the rear. His view of this vehicle had been obstructed by the intervening tractor-trailer operated by Stone. On clearing the Stone tractor-trailer, Schlagenhauf reached a position from which he could observe the lights mounted on the rear of the trailer towed by Contract Carriers, Inc. tractor. At this time, his attention was also directed to the vehicle he had just passed. Schlagenhauf's belief that the lights ahead were of no cause to concern him and his action in returning the bus to the southernmost lane clearly indicate that he had made an erroneous assessment of the situation.

"Although the mistake in judgment was that of Schlagenhauf, it does not follow that the collision as a matter of law must necessarily be attributed solely to him. His conduct in passing and giving attention to the Stone vehicle may be characterized as normal incidents of highway travel. Further, the normal flow of traffic does not exclude a situation in which the operator of one vehicle may have but a few seconds in which to arrive at an evaluation as to the speed and relative location of another vehicle on the highway. Under such circumstances, a vehicle proceeding at an unusually slow speed, that is, unusual in the light of the conditions of the road, the hour of travel, the amount of traffic on the highway, and the type of vehicle involved, may, by the very unexpectedness of its speed, mislead the operator of another vehicle who lacked the opportunity for a more prolonged observation.

"Schlagenhauf's negligence in the operation of the bus at an excessive speed and in failing to maintain a proper lookout unquestionably contributed to the impairment of his judgment. In light of his limited opportunity for observation of the Contract Carriers Inc. vehicle, his error may reasonably be found to have been induced also by the fact that the tractor-trailer was being operated at an unusually low speed—possibly as low as 20 miles per hour—of which its lights and general appearance on the highway gave no indication."

(Petitioners' Appendix A, page 6a, et sequa.) (Our Emphasis.)

In the case of *Sanders v. Leach,* 158 F. 2d 486, at 487, (5th Cir. 1946) quoted by the Petitioners, further direction as to the duties of the Appellate Court is given:

"It is not for the Appellate Court to substitute its judgment on a disputed issue of fact for that of the trial court where there is substantial credible evidence to support the finding."

The record reveals that the credibility of the witnesses orally heard by the trial judge were important in the determination as to whether operators approaching the Petitioners' vehicle from the rear were or were not misled.

Findings rendered in other causes dependent upon oral testimony and credibility of witnesses have been declared as ones particularly determinable by the trial court judge:

Koehler v. Ellison, 226 F. 2d 682 (7th Cir. 1955);

First National Bank of Colorado Springs v. McGuire, 184 F. 2d 620 (7th Cir. 1950);

M. W. Zack Metal Co. v. S. S. Birmingham City, 311 F. 2d 334 (2d Cir. 1962);

Weaver v. United States, 334 F. 2d 319 (10th Cir. 1964);

United States v. Skolness, 279 F. 2d 350 (8th Cir. 1960);

Molitor v. American President Lines, Ltd., 343 F. 2d 217 (9th Cir. 1965);

Baker v. United States, 343 F. 2d 222 (8th Cir. 1965);

Indemnity Insurance Co. v. Pioneer Valley Savings Bank, 343 F. 2d 634 (8th Cir. 1965).

The Seventh Circuit has followed the rule pronounced in *McAllister v. United States,* 348 U. S. 19 (1954), that Federal Rule 52(a) can be applied in a negligence determination and that a lower court's determination cannot be overturned unless "clearly erroneous." But, giving careful consideration to the opinion of the U. S. Court of Appeals for the Seventh Circuit in their determination of the Markiewicz case, one finds that the Court, whether it was re-

quired to or not, did make their own determination of the Petitioners' causal negligence.

> "This conduct may be deemed to constitute negligence." (Petitioners' Appendix A, page 8a)
>
> "*Consideration of the record discloses* that the operation of the Contract Carriers, Inc. vehicle in the manner and under the circumstances shown here may be found to have contributed to Schlagenhauf's error in judgment as to the relative position and speed of the vehicle, and that the operation of said vehicle thereby constituted a concurring, substantial factor, together with the negligence of the driver of the bus, in bringing about harm to the plaintiffs. *The standards of causal negligence under Indiana law are met thereby. Huey v. Milligan,* 242 Ind. 93, 175 N. E. 2d 698, at 703 (1961)." (Petitioners' Appendix A, page 7a et sequa.) (Emphasis ours.)

The Petitioners further urge that there was a departure from accepted and usual course of judicial procedure which should be corrected that arose from the Appellate Court's affirmation of the violation of the Indiana low speed statute, Burns' Indiana Statutes Annotated, Section 47-2006 (1952 Replacement Supplement). The Petitioners state that where the facts are undisputed, a question of law is presented upon which the Appellate Court should make its own determination.

The Respondents, The Greyhound Corporation and Robert L. Schlagenhauf, disagree with, and the record does not support, Petitioners contention that the facts were undisputed. Contrary to what the Petitioners assert, the facts were vigorously disputed. The oral testimony of the driver of the Greyhound Bus, Schlagenhauf, and the driver of the Contract Carriers unit, Joseph McCorkhill, conflicted on major dynamic portions of the evidence such as the speed

of the Greyhound Bus, the speed of the tractor trailer, the speed of the preceding vehicle, the distance between vehicles, time elements before contact, lanes of travel, position of lights, observance of lights, and a myriad of other controversies.

That the Court of Appeals for the Seventh Circuit failed to review the standard applied with reference to the Indiana slow speed statute is not borne out by the opinion written by the Seventh Circuit. Petitioners have continually urged, both here and in the Court of Appeals, that there was no basis for the finding that Petitioners violated the Indiana low speed statute because one lane of traffic was apparently clear and for the further reason the Petitioners' speed was of no consequence in the accident.

As the Appellate Court has stated (Petition Appendix A, P. 6a), under Indiana law this was a question of fact for the trier of the cause to be determined under the circumstances of the case. *Pohlman v. Perry,* 122 Ind. App. 222, 103 N. E. 2d 911, 915 (1952).

However, the Appellate Court examined those circumstances of the case upon which the appellants had been contentious. Applying the available case law and sifting the evidence in the record, the Appellate Court then determined:

> "The fact that an unobstructed lane of travel, that is, the northernmost of the eastbound lanes, may have been available to Schlagenhauf, did not as a matter of law obviate causal negligence which contributed to the bus driver's determination not to follow the unobstructed lane. *Seaton v. Spence,* 215 Cal. App. 761, 30 California Rptr. 510 (1963). Appellant's further theory that the collision would have occurred regardless of the speed of the tractor-trailer because of Schlagenhauf's conduct presents an area of speculation

which has *no support in the record and is not necessarily to be inferred from the evidence in the case.*" (Petitioners' Appendix A, page 8a.) (Emphasis ours.)

The Petitioners cite but do not discuss Sections 47-2010 and 47-2214(c) of Burns' Indiana Statutes Annotated as being applicable to this cause.

Neither statute was raised in the trial court, and neither statute has any application to this cause as was apparently the conclusion of the Court of Appeals.

May a motorist using the public highway elect to comply with one statute and thereby be immune from all others including the common law? May a motorist operating within one particular statute abandon reasonable prudence and care for the safety of others? Indiana has decided that a motorist may not operate with complete indifference or disregard of the safety of others. *H. E. McGonigal, Inc. v. Etherington,* 118 Ind. App. 622, 79 N. E. 2d 777 (1948).

Burns' Indiana Statutes, Annotated, Section 47-2214, has four sections which must be read together and construed together. Section 47-2214a entitled "Lamps on farm equipment" describes the required lamps for farm equipment. Section 47-2214b, "Rear lamps or flags on tractors or implements of husbandry—Definitions," defines the terms "truck-tractor", "farm tractor", "road tractor", "Implement of husbandry". Section 47-2214c entitled "Flashing lights, signal lamp or red flag required on federal, state or county highways" describes the lights required on the vehicles defined in Section 47-2214b when traveling less than 20 miles per hour, and Section 47-2214d makes a failure to comply with 47-2214c a misdemeanor.

That these statutes apply only to farm equipment such as tractors and implements of husbandry is supported by

Acts of 1963, Chapter 249, Sec. 1, page 376. Section 47-2214c was thereby amended by deleting the confusing words "truck-tractor" preceding "farm tractor"; deleting the word "or" preceding "of husbandry" and inserting the words "or horse-drawn vehicle" following "husbandry".

The vehicle operated by Contract Carriers and McCorkhill is not within the class of vehicles referred to in Burns' Indiana Statutes Annotated, Section 47-2241c.

Even if these statutes were applicable, they would not constitute an avoidance of Section 47-2006 or the common law but would rather constitute other duties imposed on the Petitioners in addition to Section 47-2006 and the common law of Indiana.

Thus the Petitioners were accorded a proper and complete appellate review.

III.

THIS COURT SHOULD DENY CERTIORARI WHERE PETITIONERS HAVE NOT DEMONSTRATED AN ISSUE OF IMPORTANCE NOR DEMONSTRATED THAT A REAL CONFLICT OF OPINION OR AUTHORITY EXISTS BETWEEN CIRCUIT COURTS OR THE PANELS OF THE SEVENTH CIRCUIT.

The Petitioners attempt to show conflict among the circuits as to whether a judge's determination of negligence as distinguished from the evidentiary facts leading to it is a conclusion of law or a finding of fact.

The Respondents urge that there is no real conflict among the circuits with respect to this alleged issue and further contend that such a question is moot with respect

to this case. Indiana has established the doctrine that if there is any reasonable doubt as to negligence or proximate cause, or where the determination of negligence depends upon a state of facts from which different minds might draw different inferences or conclusions, the issues of negligence and proximate cause are fact issues. *New York Central R. R. Co. v. Cavinder,* — Ind. App. —, 211 N. E. 2d 202 (1965).

The Respondents, The Greyhound Corporation and Robert L. Schlagenhauf, recognize that the selection of a standard of conduct is the act of the trier of the facts in a case tried without a jury and as such the "standard" is subject to review. *Pacific Tow Boat Co. v. States Marine Corp. of Dela.,* 276 F. 2d 745 (9th Cir. 1960).

The District Court of Southern Indiana used the standard of ordinary care in determining McCorkhill's negligence in operating the tractor with knowledge that it did not have sufficient power to tow a trailer at sufficient speed to avoid impeding the normal flow of traffic (Petitioners' Appendix A, page 5a) and further applied the legal standard contained in Burns' Indiana Statutes Annotated, Section 47-2006 and the standards of causal negligence contained in *Huey v. Milligan,* 242 Ind. 93, 175 N. E. 2d 698, 703 (1961); all of which legal standards were reviewed and approved by the Court of Appeals. (Petition Appendix P. 8a).

The Court in the case of *Olah v. S. S. Jaladurga,* 343 F. 2d 457, (4th Cir. 1965) comments upon the law in cases such as this where the facts are contested.

> "Of course, when an ultimate conclusion is to be drawn from the evidentiary facts already agreed or found, but the answer is also dependent upon selec-

tion of factual inferences which are reasonable deducible from the underlying facts, the conclusion is one of fact. *Castro v. Moore-McCormack Lines, Inc., supra,* 325 F. 2d 72, 75. In that event the conclusion is secured by the 'clearly erroneous' precept. *McAllister v. United States, supra,* 348 U. S. 19, 20. 75 S. Ct. 6, 99 L. Ed. 20."

The case of *Gediman v. Anheuser-Busch, Inc.,* 299 F. 2d 537 (2d Cir. 1962) contains language which indicates the semantic problems involved in determining to what degree a determination of negligence is freely reviewable upon appeal. In the Gediman case, Judge Friendly writing the opinion, indicated that "a judge's determination of negligence as distinguished from the evidentiary facts leading to it is freely reviewable on appeal . . . " 299 F. 2d 537 at 547. A careful reading of the opinion en toto indicates that what the Court was reviewing in the Gediman case when it undertook a review of the determination of negligence was the *standard* which the trial court judge applied to make the determination that the defendants had been negligent in misinforming the plaintiffs as to the consequences of an election of various pension plan options. The Appellate Court reviewing this determination concluded there was error in the *standard* applied by the trial court in that the trial court had not made a determination that the plaintiff had relied upon the conduct of the defendant. Such determination was necessary in order to hold defendants liable. (our emphasis.)

A subsequent case within the Second Circuit, *Castro v. Moore-McCormack,* 325 F. 2d 72 (1963) casts further light upon appellate review of negligence determinations. There the Court after comparing phraseology among the Appellate Court decisions, both in the Second Circuit, other cir-

cuits, and by the United States Supreme Court, made this comment:

> "There is no real inconsistency we think. It is merely a question of separating the legal from the factual elements involved in the conclusory statements where these involve a mixture of law and fact. Thus, as it is implicit in what we have already said in this opinion, if the trial judge in assaying proofs, including questions of credibility, can be shown to have arrived at his conclusionary findings by a misapplication of the law, we must set aside the findings thus made."
>
> *Castro v. Moore-McCormack,* 325 F. 2d 72 at 75.

The Petitioners have failed to state what law or standard of care should have been applied.

Where the standards are settled it would then appear that the "clearly erroneous" precept can be correctly applied to evidentiary facts and the determination of the evidentiary facts should not be overturned unless "clearly erroneous." *McAllister v. United States,* 348 U. S. 19 (1954); *Morales v. City of Galveston,* 370 U. S. 165 (1962).

The case of *United States ex rel. Rogers v. Lane,* 345 F. 2d 357 (7th Cir. 1965) was a criminal action appealing the final order in a habeas corpus proceeding. The evidence in the District Court was entirely documentary and there was little disagreement as to the facts. For the purpose of supporting the proposition that a conclusion of law is reviewable, the Court of Appeals cited in a footnote along with other decisions both in the Seventh Circuit and elsewhere the case of *Gediman v. Anheuser-Busch, Inc., supra.* Respondents support this proposition that a conclusion of law is reviewable. As Respondents have shown, there is no real conflict between the decision in the Gediman case,

supra, and decisions in other circuits, including the Seventh Circuit, regarding the extent to which legal standards and findings of fact are reviewable.

The Respondents point out that whether it was necessary or not, the United States Court of Appeals for the Seventh Circuit reviewed the facts of McCorkhill's operation of the tractor with knowledge of its defects and also arrived at an independent determination of negligence. (Petitioners' Appendix, page 8a.)

IV.

FEDERAL DISTRICT COURTS MUST APPLY STATE STATUTES AS CONSTRUED BY THE STATE COURTS. THE COURT OF APPEALS' AFFIRMATION OF THE JUDGMENT RENDERED BY THE FEDERAL DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA IS IN ACCORD WITH INDIANA LAW AND CONSISTENT WITH DECISIONS IN OTHER STATES.

The Petitioners contend that their Petition for a Writ of Certiorari should be granted in order that the Supreme Court could in some unexplained way effect a national policy as to a national minimum speed. As Petitioners pointed out, and as appendixed to their Petition, (Petition-Appendix B PP. 14a-15a) some 36 states now have enacted versions of minimum speed statutes. These statutes are similar but are not exactly alike, and have been enacted at various times in the various states within the past twenty to thirty years. All traffic laws have originated in the same manner. The doctrine set out in *Erie v. Tompkins,* 304 U. S. 64 (1938) reflects that how and in what manner state statutes are construed is a matter for the state courts.

The Federal District Court for Southern Indiana, following the law set out in the Indiana case of *Pohlman v. Perry*, 122 Ind. App. 222, 103 N. E. 2d 911 (1952), that violation of such statute involves a question of fact for the trier of the facts, found that the low speed of the tractor-trailer unit "impeded the normal and reasonable movement of traffic at the time and place in question." Such a determination is in accord and consistent with the decisions of other states which have had an occasion to construe similar slow speed statutes.

Seaton v. Spence, 215 Cal. App. 51, 30 Cal. Reports 510 (1963);

Lafferty v. Wattle, 349 S. W. 2d 519 (Mo. App. 1961);

Templar v. Tongate, 71 Wyo. 48, 255 Pac. 2d 223 (1953);

Hageman v. Townsend, 144 Mont. 510, 398 Pac. 2d 12 (1965);

Griffin v. Illinois Bell Telephone Co., 34 Ill. App. 87, 180 N. E. 2d 228 (1962).

Clearly, the Circuit Court and the District Court in the case at bar in their concurrent findings have applied what has been the law in the State of Indiana and in many other states for some time, and have not construed the Indiana statute in a manner that is inconsistent with the construction applied by the state court.

If the Petitioners seek a national policy as to minimum speed, the remedy rests with legislative processes. The diversification in minimum speed statutes presents no greater problem than the diversification among the various traffic laws within the respective states. It is obviously appar-

ent that no court can prescribe as Petitioners seek, a determination of the "obligations of all motor vehicle operators" (Petition P. 19).

Decisions to date recognize, contrary to the importance which Petitioners ascribe to speed alone, that:

> "This statute does not fix a speed which makes violation negligent as a matter of law. It merely provides that vehicles shall not travel at such a slow speed as to impede or block the normal and reasonable flow of traffic. Such slow speed is a question of fact . . . Whether or not appellee's speed was unreasonably slow and whether traffic upon the highway was unreasonably impeded or blocked by the appellee were questions of fact for the jury."
>
> *Pohlman v. Perry*, 103 N. E. 2d 911 at 915 (1952).

That the emphasis is not upon speed alone within a minimum speed statute is clearly shown also by the decision in *Lafferty v. Wattle*, 349 S. W. 2d 519 at 528 (1961) wherein the Court stated:

> "Under such a statute which does not fix the specific rate of speed, the question of whether the speed involved is so slow as to impede normal and reasonable traffic is broadly, one for the trier of fact, when reasonable men could so find."

The decision of the Court of Appeals in this cause could hardly affect vehicle traffic throughout the United States as contended by the Petitioners (Petition P. 19) when the judgment in this cause can only bind the parties, and the Court of Appeals has clearly stated a violation of a slow speed statute is a matter to be determined by the trier of the facts. Thus the fact finder in every piece of litigation involving the construction of a slow speed statute from Maine to California is free and in fact has a duty to con-

sider each case on its own merits considering all the facts and inferences to be drawn therefrom in making a determination as to statutory violation.

To contend that the facts in this cause and the Court's findings upon those special facts somehow bind other courts and other parties across the nation is parallel to arguing that a jury verdict in a negligence case in Indianapolis, Indiana, affirmed by the Indiana Supreme Court is binding upon a jury sitting in upstate New York considering the always varying, changing facts of a negligence case. Such an argument fails for the lack of any semblance of legal support.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this case is not an appropriate case for the exercise of this Court's discretionary jurisdiction and that this Petition for Writ of Certiorari should be denied.

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